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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR
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December 19, 2017

The Honorable Emily W. Murphy
Administrator
General Services Administration
1800 F Street, NW
Washington, DC 20405

Dear Administrator Murphy:

I write concerning allegations that General Services Administration (GSA) personnel, prior to your confirmation as Administrator,¹ failed to recognize and protect the privileged and confidential nature of materials generated during the presidential transition and provided them to the Special Counsel's Office without the consent of or notice to the transition entity that owns these records, Trump for America, Inc. (TFA), a private 501(c)(4) entity.² These allegations raise concerns that GSA personnel disregarded federal statutes governing presidential transitions, thereby potentially undermining the framework for future presidential transitions. As chairman of the Senate committee with jurisdiction over presidential transitions,³ I appreciate your assistance with this matter.

The Presidential Transition Act of 1963, as amended, is meant to facilitate the peaceful and efficient transfer of executive power, something that is often referred to as a "hallmark of American democracy."⁴ While the Act provides GSA a prominent role in the transition process, GSA acts merely as a facilitator of office space, supplies, and services.⁵ The Act permits presidential transition teams to operate as a private entity rather than a government component.⁶ The National Archives and Records Administration considers records of the presidential transition team to be private records—not federal or presidential records.⁷ GSA does not have authority over the transition's operations, its employees, or its records.

¹ General Services Administration, press release, "Senate Confirms Emily Murphy to Head GSA" (Dec. 5, 2017) *available at* <https://www.gsa.gov/about-us/newsroom/news-releases/senate-confirms-emily-murphy-to-head-gsa>.

² Letter from to Sens. Ron Johnson and Claire McCaskill, Chair and Ranking Member, S. Comm. on Homeland Security and Governmental Affairs, and Reps. Trey Gowdy and Elijah Cummings, Chair and Ranking Member, H. Comm. on Oversight and Government Reform, from Kory Langhofer, Counsel to Trump for America, Inc., (Dec. 16, 2017).

³ S. Rule XXV(k)(1).

⁴ S. Comm. Rep. No. 114-94, The Presidential Transitions Improvements Act of 2015, at 2, <https://www.congress.gov/114/crpt/srpt94/CRPT-114srpt94.pdf>.

⁵ 3 U.S.C. §102 note.

⁶ 3 U.S.C. § 102 note.

⁷ Memorandum from Laurence Brewer, Chief Records Officer, National Archives and Records Administration to federal agency records officers on guidance relating to president-elect transition team materials (Nov. 16, 2016), *available at* <https://www.archives.gov/records-mgmt/memos/ac09-2017>.

TFA operated as a private 501(c)(4) to support the transition operations of President-elect Trump after his election and prior to his inauguration.⁸ Records generated during the transition are not records owned by GSA.⁹ Rather, transition records are private records, subject to all appropriate confidentiality interests. As the facilitator of the transition process, GSA must recognize that “[a]ny threat of premature disclosure or other inhibition of the candid policy recommendation between agencies and transition teams would greatly impair the quality of transition efforts.”¹⁰

According to the allegations received by the Committee, the GSA’s General Counsel’s office provided records owned by TFA to the Special Counsel’s Office without the consent of or notice to TFA.¹¹ The GSA’s General Counsel’s office allegedly provided these records without the execution of a search warrant or a subpoena; instead, it produced the material voluntarily in response to a request letter.¹² In defending these actions, GSA’s Deputy General Counsel Lenny Loewentritt suggested that GSA maintained a degree of control over the records, stating that transition team members entered into agreements acknowledging possible GSA “monitoring and auditing of devices.”¹³ The GSA General Counsel’s office allegedly did not review the material for privilege or relevancy before providing records to the Special Counsel’s Office.¹⁴ In addition, according to the allegations, the Special Counsel’s Office failed to implement methods—such as “taint teams” or “ethics walls”—to protect any privileged material.¹⁵

The importance of effective and trustworthy presidential transitions to the health of the country cannot be overstated. In 2015, I joined Senator Thomas R. Carper in sponsoring the Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act of 2015.¹⁶ This law enacted important updates to transition rules that were meant to strengthen presidential transitions, including compliance with the law. For example, the law directed GSA to designate a Federal Transition Coordinator, tasked with negotiating a memorandum of understanding (MOU) with the transition representative of each eligible candidate on the conditions of access to employees, facilities, and documents of agencies by transition staff.¹⁷

Presidential transition teams also enter into an MOU with the outgoing administration, in part, “to protect the confidentiality of transition information made available to the

⁸ Drew Harwell & Lisa Rein, *Who’s helping pay for President-elect Trump’s transition effort? You are.*, Wash. Post, Nov. 23, 2016.

⁹ Memorandum from Laurence Brewer, *supra* note 7.

¹⁰ U.S. Dep’t of Justice, FOIA Update: FOIA Counselor: Transition Team FOIA Issues (Jan. 1, 1988).

¹¹ Letter from Langhofer, *supra* note 2.

¹² *Id.*

¹³ Chris Geidner, *Key Officials Push Back Against Trump Campaign’s Claim That A Federal Office Illegally Turned Over Emails to Special Counsel*, BuzzFeed News, Dec. 17, 2017, available at https://www.buzzfeed.com/chrisgeidner/the-trump-campaign-claims-a-federal-office-illegally-turned?utm_term=.ywQQG46Dv#.uwdR552NMG.

¹⁴ *Id.*

¹⁵ Letter from Langhofer, *supra* note 2.

¹⁶ Pub. L. 114–136, 130 Stat. 304 (Mar. 18, 2016).

¹⁷ *Id.*

Government.”¹⁸ For example, the MOU between the Bush Administration and the Obama-Biden Transition Project stated:

It will likely be necessary for members of the [presidential transition team] to share with the Administration information that they wish to be kept confidential. Accordingly, to the extent permitted by law, the Administration agrees to protect the confidentiality of information provided to it on a confidential basis by the [presidential transition team].¹⁹

GSA’s alleged actions could have serious ramifications for presidential transitions in the future. An incoming administration must be ready to govern on day one. Any threat to the close coordination between the transition and outgoing administration could create vulnerabilities to governance, readiness, and national security.²⁰ In minimizing vulnerabilities caused by a transition, the Justice Department has advised “afford[ing] the confidentiality necessary for candid and effective/transition team communications.”²¹ The allegations received by the Committee—namely that GSA turned over TFA privileged material, and that material later become public—could discourage future transitions from trusting GSA to secure its confidential information.

Therefore, in order to understand GSA’s response to the Special Counsel’s request for TFA’s private records, I respectfully request that you please provide the following information:

1. A description of steps taken by GSA to determine the appropriateness of providing privileged TFA documents to the Special Counsel’s Office, including the identity of the GSA staff member who authorized the production of TFA documents to the Special Counsel’s Office, and the identity of the GSA staff member designated as the Federal Transition Coordinator;
2. A copy of the Memorandum of Understanding to which TFA and GSA entered to guide the transition process from the Obama Administration to the Trump Administration;
3. Any training or guidance provided to GSA and career staff assisting presidential transition teams on the private nature of transition team’s records and the legal protections of these private materials;
4. All documents and communications between or among GSA, the Department of Justice, and the Special Counsel’s Office, referring or relating to the production of records generated during the presidential transition for President-elect Donald J. Trump;

¹⁸ Partnership for Public Service, Presidential Transition Guide, Appendix 1.1 Memorandum of understanding between George W. Bush White House and Obama-Biden Transition Project, available at <http://presidentialtransition.org/>.

¹⁹ *Id.*

²⁰ See S. Comm. Rep. No. 114-94, *supra* note 4.

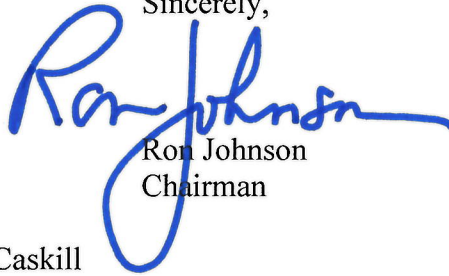
²¹ U.S. Dep’t of Justice, FOIA Update: FOIA Counselor: Transition Team FOIA Issues (Jan. 1, 1988).

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5. All documents and communications between or among GSA and TFA referring or relating to the production of records generated during the presidential transition for President-elect Donald J. Trump; and
6. All documents and communications between GSA employees or contractors referring or relating to the production of records generated during the presidential transition for President-elect Donald J. Trump.

Please provide the requested information no later than 5:00 p.m. on January 3, 2018.
Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ron Johnson", with a large, stylized flourish extending from the end of the signature.

Ron Johnson
Chairman

cc: The Honorable Claire McCaskill
Ranking Member

Enclosure

Instructions for Responding to a Committee Request
Committee on Homeland Security and Governmental Affairs
United States Senate
115th Congress

A. Responding to a Request for Documents

1. In complying with the Committee's request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data, or information should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should be read also to include the alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e. CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic form should be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - a. The production should consist of single page Tagged Image Files (".tif"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - b. Document numbers in the load file should match document Bates numbers and .tif file names.
 - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - d. All electronic documents produced should include the following fields of metadata specific to each document:

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

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- e. Alternatively, if the production cannot be made in .tif format, all documents derived from word processing programs, email applications, instant message logs, spreadsheets, and wherever else practicable should be produced in text searchable Portable Document Format (“.pdf”) format. Spreadsheets should also be provided in their native form. Audio and video files should be produced in their native format, although picture files associated with email or word processing programs should be produced in .pdf format along with the document it is contained in or to which it is attached. In such circumstances, consult with Committee staff prior to production of the requested documents.
 - f. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), consult with the Committee staff to determine the appropriate format in which to produce the information.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to the request should be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When producing documents, identify the paragraph in the Committee’s schedule to which the documents respond.
9. Do not refuse to produce documents on the basis that any other person or entity also possesses non-identical or identical copies of the same documents.
10. This request is continuing in nature and applies to any newly discovered information. Any record, document, compilation of data or information not produced because it has not been located or discovered by the return date, should be produced immediately upon subsequent location or discovery.
11. All documents should be Bates-stamped sequentially and produced sequentially. Each page should bear a unique Bates number.
12. Two sets of documents should be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
13. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as

Instructions for Responding to a Committee Request

soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.

14. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, and addressee; and (e) the relationship of the author and addressee to each other.
15. In the event that a portion of a document is redacted on the basis of privilege, provide a privilege log containing the following information concerning any such redaction: (a) the privilege asserted; (b) the location of the redaction in the document; (c) the general subject matter of the redacted material; (d) the date, author, and addressee of the document, if not readily apparent; and (e) the relationship of the author and addressee to each other.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date, name, title, or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date, name, title, or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents which would be responsive as if the date, name, title, or other descriptive detail was correct.
18. In the event a complete response requires the production of classified information, provide as much information in unclassified form as possible in your response and send all classified information under separate cover via the Office of Senate Security.
19. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.
20. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

B. Responding to Interrogatories or a Request for Information

1. In complying with the Committee's request, answer truthfully and completely. Persons that knowingly provide false testimony could be subject to criminal prosecution for perjury (when under oath) or for making false statements. Persons that knowingly withhold subpoenaed information could be subject to proceedings for contempt of Congress. If you are unable to answer an interrogatory or information request fully, provide as much information as possible and explain why your answer is incomplete.

Instructions for Responding to a Committee Request

2. In the event that any entity, organization, or person denoted in the request has been or is also known by any other name or alias than herein denoted, the request should also be read to include the alternative identification.
3. Your response to the Committee's interrogatories or information requests should be made in writing and should be signed by you, your counsel, or a duly authorized designee.
4. When responding to interrogatories or information requests, respond to each paragraph in the Committee's schedule separately. Clearly identify the paragraph in the Committee's schedule to which the information responds.
5. Where knowledge, information, or facts are requested, the request encompasses knowledge, information or facts in your possession, custody, or control, or in the possession, custody, or control of your staff, agents, employees, representatives, and any other person who has possession, custody, or control of your proprietary knowledge, information, or facts.
6. Do not refuse to provide knowledge, information, or facts on the basis that any other person or entity also possesses the same knowledge, information, or facts.
7. The request is continuing in nature and applies to any newly discovered knowledge, information, or facts. Any knowledge, information, or facts not provided because it was not known by the return date, should be provided immediately upon subsequent discovery.
8. Two sets of responses should be delivered, one set to the Majority Staff and one set to the Minority Staff. When responses are provided to the Committee, copies should be delivered to the Majority Staff in Room 340 of the Dirksen Senate Office Building and the Minority Staff in Room 346 of the Dirksen Senate Office Building.
9. If compliance with the request cannot be made in full by the date specified in the request, compliance should be made to the extent possible by that date. Notify Committee staff as soon as possible if full compliance cannot be made by the date specified in the request, and provide an explanation for why full compliance is not possible by that date.
10. In the event that knowledge, information, or facts are withheld on the basis of privilege, provide a privilege log containing the following information: (a) the privilege asserted; (b) the general subject matter of the knowledge, information, or facts withheld; (c) the source of the knowledge, information, or facts withheld; (d) the paragraph in the Committee's request to which the knowledge, information, or facts are responsive; and (e) each individual to whom the knowledge, information, or facts have been disclosed.
11. If a date, name, title, or other descriptive detail set forth in this request is inaccurate, but the actual date, name, title, or other descriptive detail is known to you or is otherwise apparent from the context of the request, provide the information that would be responsive as if the date, name, title, or other descriptive detail was correct.

Instructions for Responding to a Committee Request

12. In the event a complete response requires the transmission of classified information, provide as much information in unclassified form as possible in your response directly to the Committee offices and send only the classified information under separate cover via the Office of Senate Security.
13. Unless otherwise specified, the period covered by this request is from January 1, 2009 to the present.

C. Definitions

1. The term “document” in the request or the instructions means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” in the request or the instructions means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face to face, in meetings, by telephone, mail, telex, facsimile, email (desktop or mobile device), computer, text message, instant message, MMS or SMS message, regular mail, discussions, releases, delivery, or otherwise.
3. The terms “and” and “or” in the request or the instructions should be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

Instructions for Responding to a Committee Request

4. The terms “person” or “persons” in the request or the instructions mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, businesses or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify” in the request or the instructions, when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; and (b) the individual’s business address, email address, and phone number.
6. The terms “referring” or “relating” in the request or the instructions, when used separately or collectively, with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” in the request or the instructions means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint venturer, loaned employee, part-time employee, permanent employee, provisional employee, or subcontractor.
8. The terms “you” and “your” in the request or the instructions refer to yourself; your firm, corporation, partnership, association, department, or other legal or government entity, including all subsidiaries, divisions, branches, or other units thereof; and all members, officers, employees, agents, contractors, and all other individuals acting or purporting to act on your behalf, including all present and former members, officers, employees, agents, contractors, and all other individuals exercising or purporting to exercise discretion, make policy, and/or decisions.

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